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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

UNITED COOK INLET DRIFT  
ASSOCIATION, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, *et al.*,

Defendants.

Case No. 3:21-cv-00255-JMK  
3:21-cv-00247-JMK

WES HUMBYRD, *et al.*;

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICES, *et al.*,

Defendants.

**AMICUS BRIEF OF ALASKA SALMON ALLIANCE IN SUPPORT OF  
UCIDA PLAINTIFFS' CLAIMS**

ALASKA SALMON ALLIANCE AMICUS BRIEF  
*UCIDA, et al. v. NMFS, et al.*  
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1. The Alaska Salmon Alliance (“ASA”) provides this amicus curiae brief in  
2. support of vacating Amendment 14 to the to the Fishery Management Plan  
3. (“FMP”) for the Salmon Fisheries in the Exclusive Economic Zone (“EEZ”) Off  
4. Alaska (“Amendment 14”), and vacating its implementing regulations, as  
5. requested by United Cook Inlet Drift Association (“UCIDA”) and Cook Inlet  
6. Fisherman’s Fund (collectively “UCIDA Plaintiffs”). NMFS failed to comply with  
7. various rulemaking requirements while promulgating Amendment 14.

## 8. **I. INTEREST OF THE AMICUS CURIAE**

9. Amicus Curiae ASA is an Alaska nonprofit corporation, comprised  
10. primarily of Cook Inlet seafood processors, focused on public education,  
11. promoting the value of scientifically based salmon management to preserve  
12. habitats and create predictable harvests for all salmon users in the Cook Inlet  
13. region. ASA’s mission is to advocate for the salmon economy, for a thoughtful,  
14. process-oriented allocation of Cook Inlet salmon for the benefit of all Alaskans.

## 15. **II. ARGUMENT**

### 16. **A. Rulemaking Requirements**

#### 17. **1. Magnuson-Stevens Act**

18. One of the primary purposes of the Magnuson-Stevens Fishery  
19. Conservation and Management Act, 16 U.S.C. §§ 1801–91 (“MSA”) is “to  
20. promote domestic commercial and recreational fishing under sound conservation  
21. and management principles.” § 1801(b)(3). To do so, the MSA establishes a  
22. national program for both conservation and management to prevent overfishing, as  
23. well as development of underutilized fisheries to ensure citizens the benefit of  
24. employment, food, and revenue. § 1801(a)(6)-(7). Under the program, eight

1. Regional Fishery Management Councils were established. § 1852. To carry out the  
2. goals of the MSA, the Councils must create an FMP for each fishery requiring  
3. conservation, and enact implementing regulations. § 1852(h)(1). *See also UCIDA*  
4. *v. NMFS*, 837 F.3d 1055, 1064 (9th Cir. 2016).

5. To guide the Councils in this endeavor, Congress announced ten National  
6. Standards setting forth principles with which each FMP must be consistent. §  
7. 1851(a). Congress also specified certain provisions that each FMP must contain. §  
8. 1852(a). The Secretary of Commerce must review each plan for compliance with  
9. these statutory requirements, and proceed with a public notice and comment for  
10. regulations implementing the plan. § 1854(a)(1)(A). The Secretary of Commerce  
11. has delegated this responsibility to the NMFS. *Pac. Dawn LLC v. Pritzker*, 831  
12. F.3d 1166, 1170 (9th Cir. 2016).

13. The fishery involved here (the Upper Cook Inlet (“UCI”) salmon fishery) is  
14. within the purview of the North Pacific Fishery Management Council (“the  
15. Council”). *Id.* The Council first enacted an FMP for the salmon fishery in Alaska  
16. in 1979 (“Salmon FMP”). *See* Fishery Management Plan for the High Seas  
17. Salmon, 44 Fed. Reg. 33,250 (June 8, 1979). *See also UCIDA*, 837 F.3d at 1058.  
18. Since then, the Council has made several amendments. At issue herein is  
19. Amendment 14 to the Salmon FMP and its implementing regulations, which were  
20. approved by NMFS on November 3, 2021. *See* Final Rule, AKR0013822.

21. 2. Administrative Procedure Act

22. Actions taken by NMFS under the MSA to implement an FMP are  
23. expressly subject to review under Chapter 7 of the Administrative Procedure Act  
24. (“APA”). *See* 16 U.S.C. § 1855(f); 5 U.S.C. § 701 *et seq.* Specifically, the court

1. may “invalidate a challenged regulation if the regulation is (1) arbitrary and  
2. capricious or an abuse of discretion; (2) unconstitutional; (3) in excess of statutory  
3. jurisdiction; or (4) was promulgated without observance of procedure required by  
4. law.” *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 925 (E.D.N.C. 1995)  
5. (citing 5 U.S.C. § 706(2)).

6. An action under the MSA is arbitrary and capricious if NMFS “relied on  
7. factors which Congress has not intended it to consider, entirely failed to consider  
8. an important aspect of the problem, offered an explanation for its decision that  
9. runs counter to the evidence before [it], or is so implausible that it could not be  
10. ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle*  
11. *Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43  
12. (1983) (quoted in *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 58–59 (D.D.C.  
13. 2014)). NMFS must “respond to significant points raised during the public  
14. comment period” and “consider significant alternatives to the course it ultimately  
15. chooses.” *Nat’l Coal. for Marine Conservation v. Evans*, 231 F. Supp. 2d 119,  
16. 127–28 (D.D.C. 2002) (quoting *Allied Local Regional Mfrs. Caucus v. EPA*, 215  
17. F.3d 61, 80 (D.C. Cir. 2000)). If there is no “rational connection” between the  
18. facts and policy, NMFS’s action must be invalidated. *Id.* at 129 (citations omitted).

19. Here, in enacting Amendment 14 and its implementing regulations, NMFS  
20. failed to comply with several National Standards, and failed to include several  
21. mandatory provisions in the Salmon FMP. The UCIDA Plaintiffs’ complaint and  
22. opening brief address numerous violations of the rulemaking process affecting  
23.  
24.

1. fishermen. ASA herein focuses on how the rulemaking process failed to include  
2. requirements affecting processors.

3. **B. Amendment 14 Does Not Promote MSA Objectives.**

4. The MSA requires the Council and NMFS to develop an FMP for the  
5. purpose of conserving, yet utilizing, fisheries in the United States. This directive is  
6. clear through multiple Congressional edicts. First, Congress set forth the following  
7. express purposes of the MSA:

8. (3) to promote domestic commercial and recreational fishing  
under sound **conservation** and management principles . . . ;

9. (4) to provide for the preparation and implementation, in  
10. accordance with national standards, of fishery management plans  
11. which will achieve and maintain, on a continuing basis, the  
**optimum yield** from each fishery;

12. . . .

13. (6) to encourage the development . . . of fisheries which are  
14. currently underutilized or not **utilized** . . . [and] to ensure that  
optimum yield determinations promote such development in a non-  
wasteful manner[.]

15. 16 U.S.C. § 1801(b) (bold added). Congress similarly enacted the following  
16. relevant National Standards, with which regulations must be consistent:

17. (1) Conservation and management measures shall **prevent**  
18. **overfishing** while achieving, on a continuing basis, the **optimum**  
**yield** . . . .

19. (2) Conservation and management measures shall be based upon  
the best **scientific information** available.

20. . . .

21. (5) Conservation and management measures shall, where  
22. practicable, consider efficiency in the **utilization** of fishery  
resources; except that no such measure shall have economic  
allocation as its sole purpose.

1. *Id.* § 1851(a) (bold added). These statutory mandates illustrate that the purpose of  
2. every FMP must be to optimize the fisheries productivity through the balancing of  
3. conservation with utilization. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Blank*,  
4. 693 F.3d 1084, 1102 n. 15 (9th Cir. 2012) (“The National Standards, and the MSA  
5. more generally, require NMFS to balance conservation with yield, not favor one at  
6. the expense of the other.”).

7. NMFS claims that Amendment 14 serves the purpose of preventing  
8. overfishing. *See, e.g.*, Final Rule, at AKR0013823 (“This action [ ] takes the most  
9. precautionary approach to minimizing the potential for overfishing[.]”). This  
10. claim, however, falls short for two reasons. First, it is clear from the administrative  
11. record that one of the primary motivating factors for Amendment 14, if not the  
12. motivating factor, was actually administrative convenience. But administrative  
13. convenience is not sanctioned goal. Second, even if prevention of overfishing  
14. formed some basis for Amendment 14, it was not balanced with utilization and  
15. other National Standards.

16. The first and strongest indicators that overfishing prevention was not the  
17. true purpose of Amendment 14 are NMFS’ own findings that (1) “[o]verfishing is  
18. not occurring for any Cook Inlet salmon stocks, and none are in an overfished  
19. status,” Final RIR, at AKR0000324, and (2) “[n]o management alternatives under  
20. consideration were expected to increase harvests of Cook Inlet salmon stocks,”  
21. Final Rule, at AKR0013826, AKR0013839. In fact, the Committee formed by the  
22. Council to review the matter concluded that underfishing was a risk and  
23.  
24.

recommended adding an objective to prevent underfishing. *See* Final RIR, at AKR0000081-82.

The reality of underfishing is borne out in existing data. As discussed in detail in UCIDA's letter dated March 28, 2017, and included in NMFS's Regulatory Impact Review, harvest data from 2011-2016 demonstrates that not enough salmon are being caught relative to escapement goals. *See id.* at AKR0000420-24. More recent data for the Kenai River for sockeye salmon through 2021 reveal the same issue continues to occur and is not improving.<sup>1</sup> As shown in this data, the number of fish being caught is nowhere near the escapement goals set by Alaska. *Id.* (7.1 million fish less than desired were caught from 2002-2021).

There are two "very real implications" to underfishing. *See* Final RIR, at AKR0000472 (NOAA report). First, underfishing results in financial loss from foregone harvest. *Id.* at AKR0000422, AKR0000472. Second, due to the complex biological salmon cycle, underfishing one year is likely to lead to decreased salmon returns in future years. *Id.* Neither result aligns with National Standard 1. Despite these verities, NMFS rejected, without explanation, the Committee's recommendation to include an objective to prevent underfishing. *See id.* § 2.7, AKR0000151-55 (discussing why certain recommendations were rejected, but not the underfishing objective). Thus, while NMFS lauded the scientifically based

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<sup>1</sup> Attached as Exhibit A is a table prepared by ASA based on the industry's best estimates showing Kenai River late-run sockeye salmon escapement numbers for the years 2000 through 2021.

1. process employed by Alaska to monitor escapement, NMFS turned a blind-eye to  
2. the failure to meet escapement goals. *See, e.g., id.* at AKR0000162-64.

3. Furthermore, even though salmon fishing may still be permitted in State  
4. waters, NMFS has no intention of monitoring the salmon stock for overfishing,  
5. which affirms that NMFS has no real concern about overfishing. *See id.* at  
6. AKR0000049 (“How is overfished/overfishing determined? n/a”). There is simply  
7. no rational connection between NMFS’s finding that there is no overfishing or risk  
8. of overfishing, and the proffered objective of preventing overfishing. This alone is  
9. fatal to Amendment 14. *See, e.g., Nat’l Coal. for Marine Conservation*, 231 F.  
10. Supp. 2d at 127–28 (An agency must “articulate a satisfactory explanation for its  
11. action including a ‘rational connection between the facts found and the choice  
12. made.’”). *See also Motor Vehicle Mfrs.*, 463 U.S. at 43 (Action is arbitrary and  
13. capricious if the agency “offered an explanation for its decision that runs counter  
14. to the evidence before [it].”).

15. The true basis for NMFS’s decision to close the fishery is evident through  
16. its abundant reference to administrative convenience, too many to list herein. For  
17. example:

- 18. • “This action . . . (3) avoids creating new **management**  
19. **uncertainty**, (4) minimizes **regulatory burden** to fishery  
20. participants, (5) maximizes **management efficiency** for the  
21. Cook Inlet salmon fishery and (6) avoids the introduction of  
22. an **additional management** jurisdiction into the already  
23. complex and interdependent network of Cook Inlet salmon  
24. fishery sectors.” Final Rule, at AKR0013823.
- “Closing the EEZ to commercial salmon fishing avoids  
creating the significant new **management uncertainty**  
associated with Alternative 3 . . .” *Id.* at AKR0013823-24.



- 1. • “[The Alternative 3] **management structure** would not, in  
2. and of itself, lessen the conflicts inherent in the difficult task  
3. of allocating salmon . . . . Under any of the action  
4. alternatives, NMFS would . . . have to account for removals  
5. within State waters by all Cook Inlet salmon fishery sectors  
6. and the attendant uncertainty when determining the  
7. appropriate level of harvest in Federal waters.” *Id.* at  
8. AKR0013824.
- 9. • “To expand Federal management to the Cook Inlet EEZ, the  
10. Council **would need to develop status determination**  
11. **criteria** for the salmon stocks in the Cook Inlet area.” Final  
12. RIR, at AKR0000097.
- 13. • “[I]t is consistent with the Council’s practice and policy to  
14. close the Cook Inlet EEZ to continue to **facilitate State**  
15. **management** of fully utilized salmon fisheries.” *Id.* at  
16. AKR0000160.
- 17. • “The Council’s salmon management policy is to **facilitate**  
18. **State of Alaska salmon management** in accordance with the  
19. Magnuson-Stevens Act, Pacific Salmon Treaty, and  
20. applicable Federal law.” *Id.* at AKR0000105, AKR0000111,  
21. AKR0000148.
- 22. • “[B]y prohibiting commercial harvest in the Cook Inlet EEZ,  
23. the Council and NMFS **avoid creating new management**  
24. **uncertainty** . . .” *Id.* at AKR0000360.
- “Alternative 4 would **enable the State to manage** salmon  
fisheries . . .” *Id.*
- “Alternatives 2 and 3 would both require **coordination and**  
**work** by the BOF alongside the Council.” *Id.* at  
AKR0000349.
- “Alternative 4 would be the most efficient of the action  
alternatives in terms of **administrative costs and**  
**management efficiency**. Alternative 4 would maintain  
administrative costs at or near existing levels for the State of  
Alaska and there would be minimal to no additional costs to  
the Council and NMFS.” *Id.* at AKR0000362.
- “[H]aving participants operating under multiple sets of  
regulations would increase the **enforcement and**  
**administrative complexity** of the fishery.” *Id.* at  
AKR0000383.

- 1. • [C]losure minimizes **regulatory burden** . . .” *Id.* at  
AKR0000363.
- 2. • “[C]losure of the Cook Inlet EEZ would create the most  
3. **efficient Cook Inlet salmon management** arrangement.” *Id.*

4. (Emphasis added throughout).

5. To support closure to commercial fishing, NMFS also attempted to describe  
6. dual management with the State of Alaska as so administratively complex as to be  
7. nearly impossible. *See id.* § 4.8, at AKR0000354-56 (describing coordination  
8. requirements for other options). But this contradicts NMFS’s acknowledgement  
9. that other fisheries are successfully dually managed by Alaska and federal  
10. agencies. NMFS noted that “[i]n other instances where a fishery occurs in both  
11. state and Federal waters, Federal management of the Federal portion of the fishery  
12. is responsive to state management of the portion of the fishery that occurs in state  
13. waters.” Final Rule, at AKR0013826. Examples include the Pacific cod fisheries  
14. in the Gulf of Alaska and Aleutian Islands, which abuts the Amendment 14 area.  
15. *Id.* And in an ironically timed opinion piece, the Commissioner of the Alaska  
16. Department of Fish and Game touts the State’s ability to manage salmon in  
17. Southeast Alaska in conjunction with both the United States and Canadian  
18. governments,<sup>2</sup> but NMFS contends that dual management in Cook Inlet is nearly  
19. impossible. In other words, NMFS knows how to dually manage fisheries, but  
20. refused to do so here. NMFS offered no explanation why dual management works  
21. in the Pacific cod fisheries, but will not work in Cook Inlet. *See also Motor*

22. <sup>2</sup> *See* Doug Vincent-Lang, *Opinion: Special Interest Hit Piece Unfairly Targets*  
23. *Southeast Fisheries*, JUNEAU EMPIRE, Jan. 14, 2022,  
24. <https://www.juneauempire.com/opinion/opinion-special-interest-hit-piece-unfairly-targets-southeast-fisheries> (attached as Exhibit B).

1. *Vehicle Mfrs.* 463 U.S. at 43 (noting that action is arbitrary and capricious if the  
2. agency “offered an explanation for its decision that runs counter to the evidence  
3. before [it], or is so implausible that it could not be ascribed to a difference in view  
4. or the product of agency expertise.”).

5.       Undoubtedly, it might take more effort by NMFS to manage the Cook Inlet  
6. commercial salmon fishery in coordination with the State of Alaska than it would  
7. to close the fishery and not deal with it all. But that is not the pertinent question.  
8. The pertinent question is whether NMFS’s desire for administrative ease (rather  
9. than conservation) drove its decision to close the commercial fishery. The record  
10. demonstrates it did.

11.       But administrative ease is not a Congressionally approved objective under  
12. the MSA. Under rulemaking jurisprudence, an action is arbitrary and capricious if  
13. the agency “relied on factors which Congress has not intended it to consider.”  
14. *Motor Vehicle Mfrs.*, 463 U.S. at 43. As stated by the Honorable Chief Judge  
15. James von der Heydt of this Court,

16.       The court can certainly understand the motivation of the Secretary in  
17. this instance. . . . Clearly it would be more convenient to reserve the  
18. floating easement but convenience is not the touchstone of his  
19. authority.

20. *Alaska Pub. Easement Def. Fund v. Andrus*, 435 F. Supp. 664, 680 (D. Alaska  
21. 1977). Because administrative ease is not a guiding principle under the MSA,  
22. NMFS’s actions with respect to Amendment 14 were arbitrary and capricious, and  
23. Amendment 14 should be invalidated.

24.       Lastly, even if overfishing prevention were NMFS’s true purpose, NMFS  
failed to balance it with utilization. Assuming overfishing were a legitimate

1. concern, closing the EEZ to commercial salmon fishing without any intent to  
2. reevaluate and reopen in the future prioritizes overfishing over all else. This, too,  
3. violates the MSA.

4. **C. By Failing to Consider Community Impacts, Amendment 14 is Not**  
5. **Consistent with National Standard 8.**

6. In addition to balancing utilization with conservation, Congress clearly  
7. expressed that social and economic impacts on affected communities must be  
8. taken into consideration in every FMP and regulatory action under the MSA.  
9. While NMFS appears to have considered various data regarding the size and  
10. composition of the Cook Inlet salmon fishery, NMFS failed to consider impacts on  
11. the processing industry and associated communities.

12. National Standard 8 requires that:

13. Conservation and management measures . . . take into account the  
14. importance of fishery resources to **fishing communities** by utilizing  
15. **economic and social data** that meet the requirements of paragraph  
(2), in order to (A) provide for the sustained participation of such  
communities, and (B) to the extent practicable, minimize adverse  
economic impacts on such communities.

16. 16 U.S.C. § 1851(a)(8). For example, as noted in NMFS's own Guideline, NMFS  
17. should consider whether severe reductions in harvest will decrease employment  
18. opportunities of processors and adversely affect their families and communities.  
19. 50 C.F.R. § 600.345(c)(1). *See Groundfish Forum v. Ross*, 375 F. Supp. 3d 72, 88  
20. (D.D.C. 2019) (employment should be considered). Other factors to consider  
21. include impacts on maintaining communities, *id.* at 88, the size of affected  
22. communities, *N. Carolina Fisheries Ass'n, Inc. v. Daley*, 27 F. Supp. 2d 650, 665  
23. (E.D. Va. 1998), and profit margins so that resiliency can be evaluated, *id.*

1. In adopting Amendment 14, NMFS seems to have reviewed various data  
2. sets relating to landing of fish harvests, but did not consider what effect closure of  
3. the commercial drift gillnet fishery would have on processors and their associated  
4. communities. For example, NMFS did not consider lost profit and its impact on  
5. the community. Indeed, NMFS reviewed the number of people employed and total  
6. wages earned in Kenai Peninsula shorebased processors active in the UCI salmon  
7. gillnet fishery from 2009 to 2018. *See* Final RIR, at AKR0000262. But the data  
8. was not broken down by community, nor was it developed out in relationship to  
9. the communities' size. This limitation renders the data essentially meaningless  
10. because one cannot discern the actual impact on the communities. Clearly, the loss  
11. of 10 jobs in a city of 100,000 would not have the same impact as the loss of 10  
12. jobs in a town of 200. *See, e.g., N. Carolina Fisheries Ass'n*, 27 F. Supp. 2d at 662  
13. (“[W]ithout demographic information, the number of vessels impacted by the  
14. Secretary’s actions is meaningless for determining adverse impacts on  
15. communities.”).

16. NMFS also reviewed the estimated wholesale value of landings in the UCI  
17. salmon drift gillnet fishery from 2009 to 2018. Final RIR, at AKR0000262. But  
18. again, the data is for the entire fishery and was not broken down by community,  
19. nor was it provided in relationship to each community’s size, so it is essentially  
20. meaningless. *N. Carolina Fisheries Ass'n*, 27 F. Supp. 2d at 662.

21. NMFS reviewed several other similar data sets, each summarizing a  
22. specific data point, but none examines how any particular community would be  
23. impacted, or how resilient the processor industry would be to the commercial  
24.

1. fishery closure. *See id.* at 665 (discussing importance of resiliency considerations).  
2. While it may not be necessary for NMFS to review the impact on *every* possible  
3. community affected by Amendment 14, close examination of *some* is necessary.  
4. *See id.* at 664 (“Certainly, the Secretary need not consider every fishing  
5. community remotely affected by his quota regulations. Yet where an examination  
6. is warranted, the Court has no authority to waive the Secretary’s obligations under  
7. the Act.”).

8. In fact, NMFS ignored public comments alerting NMFS that entire  
9. processing businesses were likely to cease operating, that local spending on  
10. support services would decrease, that operations in Homer would no longer be  
11. practical, that fishing heritage and culture would be compromised, that set net  
12. fisherman will also cease to operate if processors go out of business, that the  
13. quality of salmon in State waters is lower and will drive the price down, and that  
14. fishery participants may no longer be able to afford insurance. *See, e.g.,* Final  
15. Rule, at AKR0013830-34 (comments 27, 28, 29, 33, 36, 37). Rather than  
16. investigate these issues, NMFS insisted that the generalized data it had already  
17. reviewed was more reliable and appropriate than the representations of community  
18. members. *Id. See also Oregon Trollers Ass’n v. Gutierrez*, 452 F.3d 1104, 1123  
19. (9th Cir. 2006) (suggesting that missing data, analysis, and explanation could  
20. support invalidation of NMFS rulemaking under MSA).

21. In sum, while NMFS reviewed some data, none of it revealed the  
22. community impacts expected to flow from Amendment 14, as reported by  
23. members of the public. By failing to consider such data, NMFS violated National  
24.

Standard 8 and its rulemaking was therefore arbitrary and capricious. *See Motor Vehicle Mfrs.*, 463 U.S. at 43 (noting that an action is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem.”).

**D. The Conclusions Reached by NMFS Regarding the Community Impact Data it did Review are not Rational.**

In addition to failing to consider pertinent data regarding community impact, NMFS reached irrational conclusions regarding the community impact data it *did* consider. In § 4.5.2.3 of its Regulatory Impact Review, NMFS explained in detail how it determined what percentage of the historical UCI salmon drift gillnet fishery harvest came from state versus federal EEZ waters. *See* Final RIR, at AKR0000236-40. NMFS concluded that approximately 48% of the total UCI salmon drift gillnet fishery catch from 2009 to 2018 came from federal waters. *Id. See also id.* at AKR0000277-81 (applying the 48/52 split to various data points). In other words, NMFS was aware that Amendment 14 would close off an area that has historically provided **nearly half** of the salmon harvest to the UCI drift gillnet fishery.

NMFS also recognized that “a number of factors may potentially make it difficult for vessels to fully offset the loss of access to the EEZ by increasing effort inside State waters.” *Id.* at AKR0000327. Obstacles include lower catch rates translating into less revenue, less favorable rip tides, congestion costs such as gear conflicts and entanglement, and increased travel to reach fishing grounds. *Id.* Collectively, NMFS admitted:

The combination of adverse effects on the profitability of fishing operations resulting from a permanent closure of the EEZ may cause the UCI drift gillnet fleet size to shrink, as some fishermen may



1. choose not to participate in the fishery or shift their fishing effort to  
2. other areas.

3. *Id.* And even if Alaskan agencies increase drift gillnet fishing opportunities in  
4. some areas of State waters,<sup>3</sup> NMFS acknowledged the catch rate for those  
5. additional fishing areas would still be lower than the EEZ, and would have the  
6. likely result of negative impact on other harvests. *Id.* Switching to State waters  
7. would also require current UCI drift gillnet permit holders to sell their permits  
8. (which will now have little to no value) and buy permits for State waters.

9. Because the harvest will likely be decreased, NMFS also acknowledged  
10. that the processing sector will face similar obstacles.

11. Smaller operations would probably be more affected by changes in  
12. salmon landings than larger buyers because smaller buyers tend to  
13. be less diversified in the range of species handled. In addition, . . . a  
14. number of large shorebased processors are heavily dependent on  
15. UCI drift gillnet-caught salmon [and] [s]ubstantial decreases in  
16. production could lead to a temporary shutdown or permanent closing  
17. of some processing businesses.

18. *Id.* NMFS further acknowledged that processors will likely experience a change in  
19. landing patterns and operational flow, which will shift when and where the harvest  
20. reaches the market, which will in turn impact local availability and price. *Id.* at  
21. AKR0000328.

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22. <sup>3</sup> Significantly, there is no indication that Alaska will facilitate additional commercial  
23. fishing. To the contrary, Alaskan agencies have been “systematically putting the Cook  
24. Inlet commercial fisheries out of business.” *See* Elwood Brehmer, *Dunleavy  
Administration Enters Court Fight Alongside Feds to Keep Cook Inlet Fishing Grounds  
Closed*, ANCHORAGE DAILY NEWS, Jan. 12, 2022, [https://www.adn.com/alaska-  
news/2022/01/11/dunleavy-administration-enters-court-fight-alongside-feds-to-keep-  
cook-inlet-fishing-grounds-closed/](https://www.adn.com/alaska-news/2022/01/11/dunleavy-administration-enters-court-fight-alongside-feds-to-keep-cook-inlet-fishing-grounds-closed/) (attached as Exhibit C). *See also* Final RIR, at  
AKR0000309 (“The [ADF&G Division of Sport Fisheries]’s mission is to protect and  
improve the State’s recreational fisheries resources.”) (Emphasis added).



1. Despite these grave forecasts, NMFS nonetheless concluded that  
2. Amendment 14 “would provide for sufficient salmon harvest opportunity in State  
3. waters to largely offset the costs.” NMFS also inexplicably concluded that  
4. [C]losing the Cook Inlet EEZ to commercial salmon fishing would  
5. result in additional harvest opportunity in State waters, and that the  
6. associated benefits would be distributed across Cook Inlet fishing  
7. communities given the diversity of users involved. In all, the  
8. Analysis supports a finding that this action will provide for the  
9. sustained participation of fishing communities in Cook Inlet salmon  
10. fisheries, even if there is some redistribution of benefits.  
11. *Id.* at AKR0000363 (emphasis added). Somehow, NMFS turned the myriad of  
12. obstacles into benefits. These conclusions “run counter to the evidence” and were  
13. “so implausible that [they] could not be ascribed to a difference in view or the  
14. product of agency expertise.” *See Motor Vehicle Mfrs.*, 463 U.S. at 43. Because  
15. there is no rational connection between Amendment 14 and the underlying facts,  
16. Amendment 14 must be invalidated.

14. **E. The Allocation of Fishing Access to the EEZ is not Fair and Equitable  
15. to Processors, which Violates National Standard 4.**

16. NMFS also violated the MSA because Amendment 14 is not consistent  
17. with National Standard 4, which requires that any allocation of fishing privileges  
18. be “fair and equitable,” “reasonably calculated to promote conservation,” and  
19. carried out in such manner to prevent excessive share to any individual or entity.  
20. 16 U.S.C. § 1851(a)(4). Rather than address the issue, NMFS simply claimed that  
21. Amendment 14 does “not allocate or assign fishing privileges,” which is not  
22. accurate. *See* Final RIR, at AKR0000361. *See also* Final Rule, at AKR0013836.

23. Amendment 14 closes the Cook Inlet EEZ fishery only to commercial  
24. salmon fishing. *See* Final RIR, at AKR0000147; Final Rule, at AKR0013823. The

EEZ remains open to other fishing sectors, including recreational and commercial guided sport fishing. *See* Final Rule, at AKR0013839 (Response to Comment 63). By definition, therefore, NMFS has allocated fishing rights between the commercial, recreational, charter, subsistence, and personal use sectors.

Guidelines issued by NMFS are in accord:

An “allocation” . . . is a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals. . . [F]or example, . . . different quotas or fishing seasons for **recreational and commercial fishermen**, assignment of ocean areas to different gear users, and limitation of permits to a certain number of vessels or fishermen.

50 C.F.R. § 600.325(c)(1). *See also Groundfish Forum*, 375 F. Supp. 3d at 88 (noting that a rule under which vessels could only deliver their catch to one facility constitutes an allocation of resources under National Standard 4).

Because Amendment 14 allocates fishing rights among commercial, recreational, commercial guided sport, subsistence, and personal use fishermen, the FMP must be consistent with National Standard 4. By characterizing its actions as something other than allocation, NMFS avoided such analysis. *See* Final RIR, at AKR0000361-62. But even a cursory review reveals that Amendment 14 woefully violates the first two requirements of National Standard 4.

First, National Standard 4 requires allocation to be “fair and equitable.” 16 U.S.C. § 1851(a)(4). Amendment 14 is discriminatory on its face. There is nothing fair and equitable about NMFS’s decision that recreational and commercial guided sport fishermen are more deserving of salmon than commercial fisherman (or others) and NMFS offered no explanation for the disparate treatment. *Contra Nat’l Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 225 (D.D.C. 1990)

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1. (regulation did not violate National Standard 4 where “the provisions challenged  
2. by the plaintiffs [were] not facially discriminatory against commercial fishermen”  
3. and there was a reasonable basis to the differential treatment). This inequality hits  
4. processors particularly hard because recreational and commercial guided sport  
5. fishermen do not sell their fish to processors.

6. Second, the allocation must be reasonably calculated to **promote**  
7. conservation. 16 U.S.C. § 1851(a)(4). An allocation that is conservation-neutral or  
8. harms conservation is not permitted under National Standard 4. *Groundfish*  
9. *Forum*, 375 F. Supp. 3d at 88. As discussed above, Amendment 14 is motivated  
10. primarily by administrative convenience and not conservation. There is no  
11. overfishing problem. Because there is no overfishing problem, conservation is not  
12. promoted by discriminating against commercial fishermen and processors. *See*  
13. *supra* § II.B.

14. Because it is not consistent with National Standard 4, Amendment 14  
15. should be invalidated.

16. **F. Amendment 14 Fails to Include Mandatory Provisions.**

17. Lastly, NMFS failed to comply with 16 U.S.C. § 1853(a), which sets forth  
18. fifteen provisions that “shall” be included in any FMP prepared by NMFS. The  
19. Salmon FMP, as amended by Amendment 14, fails to include five.

20. 1. Capacity to Process the Optimum Yield

21. Every FMP shall “assess and specify the capacity and extent” to which  
22. processors can process the optimum yield. § 1853(a)(4)(A). In its Regulatory  
23. Impact Review, NMFS referred to § 6.3 of the Salmon FMP and notes “no  
24. change.” Final RIR, at AKR0000092. But § 6.3 of the Salmon FMP (as amended

1. by Amendment 14) simply states “domestic processors have been able to process  
2. the entire commercial troll harvest of salmon; there is no reason to expect that  
3. situation to change.” Salmon FMP, at AKR0019511. Amendment 14 did not alter  
4. this text and therefore does not address closure of the Cook Inlet EEZ to  
5. commercial fishing. There is no discussion of how capacity will be affected by  
6. closing an area that supported nearly 50% of the drift gillnet salmon harvest, or  
7. whether processing demands can still be met if processors go out of business.

8.       2.     Fishery Impact Statement

9.       Every FMP shall include a fishery impact statement, which shall “assess,  
10. specify, and analyze” the likely conservation, economic, and social impacts and  
11. mitigation measures on fishing communities affected by the amendment. §  
12. 1853(a)(9)(A). While the Salmon FMP does contain a fishery impact statement, it  
13. relies on data available in 2010. *See* Salmon FMP, at AKR0019516-37 (Chapter  
14. 8). The only portions of the fishery impact statement updated since 2012 relate to  
15. bycatch and vessel safety. *See* Amendment Text, at AKR0001918-19 (revisions to  
16. Chapter 8). The amended fishery impact statement does not address closure of the  
17. Cook Inlet commercial salmon fishery, and does not address community impacts  
18. (as discussed in more detail above).<sup>4</sup> *Id.*; *supra* §§ II.C & II.D.

19.       3.     Identifying Overfishing

20.       Every FMP must “specify objective and measurable criteria for identifying  
21. when the fishery to which the plan applies is overfished.” § 1853(a)(10). As it

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22.       <sup>4</sup> NMFS asserted that the RIR suffices as the fishery impact statement, but the statutory  
23. language suggests otherwise. Persons should not have to review an entire administrative  
24. record to find something that Congress said should be “included” in “any” FMP. 16  
U.S.C. § 1853(a)(9).

1. relates to the Cook Inlet, the Salmon FMP states only that “other [unidentified]  
2. federal FMPs, together with the State’s scientifically-based management program  
3. in waters adjacent to the West Area, ensure that overfishing of salmon does not  
4. occur[.]” Salmon FMP, at AKR0019511. There are no objective or measurable  
5. criteria for identifying overfishing.

6.       4.     Trends in Landings for Each Sector

7.       Every FMP must “quantify trends in landings of the managed fishery  
8. resource by the commercial, recreational, and charter fishing sectors.” §  
9. 1853(a)(13). The FMP contains only landing data from 1991 to 2010, which is  
10. over a decade old.

11.       5.     Fair and Equitable Allocation

12.       For every FMP in which harvest reduction is necessary, fishing rights must  
13. be allocated “fairly and equitably among the commercial, recreational, and charter  
14. fishing sectors in the fishery.” § 1853(a)(14). As discussed above, NMFS denied  
15. there is any allocation and therefore did not include this content. For the reasons  
16. stated above, there was an allocation and it should be addressed in the Salmon  
17. FMP. *See supra* § II.E.

18.       Because Amendment 14 does not include several requisite provisions for  
19. the Salmon FMP, NMFS violated the MSA and Amendment 14 should be  
20. invalidated. *See Motor Vehicle Mfrs.*, 463 U.S. at 43 (noting that an action is  
21. arbitrary and capricious if the agency “entirely failed to consider an important  
22. aspect of the problem”); *Trawler Diane Marie*, 918 F. Supp. at 925 (invalidation  
23. appropriate where regulation is “promulgated without observance of procedure  
24. required by law.”).

1. **III. CONCLUSION**

2. For the above reasons, ASA requests that Amendment 14 be invalidated,  
3. and NMFS directed to produce an Amendment to the Salmon FMP, for the entire  
4. Cook Inlet salmon fishery, consistent with the MSA and other applicable federal  
5. law, within one year.

6. DATED this 7th day of February, 2022.

7. HOLMES WEDDLE & BARCOTT, P.C.

8. /s/Michael A. Barcott  
9. Michael A. Barcott, ABA # 7705005  
10. James N. Butler, III ABA # 9311066  
11. Attorneys for Alaska Salmon Alliance

12. I certify that this pleading contains 5,591  
13. words.

14. **CERTIFICATE OF SERVICE**

15. The undersigned certifies under penalty of perjury of the laws of the State  
16. of Washington that, on the 7<sup>th</sup> day of February, 2022, the foregoing was  
17. electronically filed with the Clerk of Court using the CM/ECF system, which will  
18. send notification of such filing to all counsel of record using the CM/ECF system.  
19.

20.  
21. /s/ Michael A. Barcott  
22. Michael A. Barcott, ABA #7705005

23. G:\7935\33314\Pleading\ASA Amicus Brief 2-7-22.docx  
24.

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